
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: JAN 7 1987
CASE NO. 86-ERA-37

In the Matter of

DANIEL C. EMORY
Complainant

v.

NORTH BROTHERS COMPANY
Respondent

John P. Batson, Esquire
For the Complainant

Charles Whitney, Esquire
For the Respondent

Before: ROBERT J. SHEA
Administrative Law Judge

DECISION AND ORDER

The above-captioned proceeding arises under the Energy Reorganization Act (hereinafter the "Act") of 1974, 42 U.S.C. § 5851 and the Regulations found at 29 C.F.R. Part 24. It involves the complaint of Daniel C. Emory against Respondent, North Brothers Company. Pursuant to Notice of Hearing issued September 11, 1986 a hearing was held at Augusta, Georgia on September 30, 1986. At this time the parties, as represented by counsel, were afforded the opportunity to present evidence, cross examine witnesses and submit written statements.

ISSUES

The issues in the case are:

(1) Whether Complainant is a protected employee under the Act;

(2) Whether Complainant's actions constitute protected activity under the Act; and

(3) Whether Complainant would have been denied overtime pay and have been included in a reduction of force had he not been engaged in protected activity.

FINDINGS OF FACT

A. *The Parties*

The Complainant in this case is Daniel C. Emory who worked from February 24, 1986 through June 25, 1986 as a journeyman insulator at the Plant Vogtle Nuclear Project. The Respondent in the case is North Brothers Company, a division of National Service Industries, Inc., a contractor performing insulation work at Plant Vogtle. At the time of the hearing Respondent employed 450 craft and 50 staff employees at the Plant Vogtle site.

B. *The Plant Vogtle Nuclear Power Project Quality Concern Program*

Respondent's Proposed Findings describe Plant Vogtle Project and its Quality Concern Program succinctly and I hereby adopt the following findings as my own:

The Vogtle Project is a nuclear electric generating facility currently under construction in Burke County, Georgia, approximately 34 miles south of Augusta. The Project is comprised of two 1,600 megawatt generating units. Unit No. 1 is currently 99% complete, with commercial operation scheduled for June 1987. Unit No. 2 is approximately 60% complete, with commercial operation expected in September 1988. The Vogtle Project is co-owned by Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the city of Dalton. Georgia Power Company acts as agent for other co-owners and is principal operator and constructor of the Vogtle facility. (Co. Ex. 4, T. 156)[1]

Georgia Power has several programs in place designed to enhance and

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ensure both personal and operating safety. One of these programs is the "Quality Concerns Program" which is designed to ensure that everyone involved with the Project has an opportunity to raise any quality or safety concerns outside normal supervisory channels. Individuals participating in this program are promised confidentiality and are

given the opportunity to participate anonymously. All concerns are investigated and, if the concern is well founded, prompt corrective action is taken. The Quality Concern Program is completely separated from normal Project construction management. (Co. Ex. 8, T. 186)

Employees may raise concerns with the internal "Quality Concerns Program" relating to violations of Nuclear Regulatory Commission (NRC) regulations, as well as to items or activities that are merely in variance to approved procedures or good engineering practices. The U.S. Nuclear Regulatory Commissions, however, has regulatory responsibility for matters affecting public health and safety and compliance with its regulations and requirements. (Co. Ex. 8) This responsibility has not been transferred or assigned to the Quality Concerns Programs.

C. *Complainant's Employment in General*

Complainant worked on the "A" shift from February 24, 1986 through June 19, 1986. During this time he worked under four different foremen. The first was Ricky Dugger, under whom he worked on chilled water piping, duct work main steam work as well as various other jobs. (T. 54) During the time that Dugger was his foreman Complainant did not file any quality concerns.

Two incidents mark the period during which Dugger was Complainant's foreman. First, Dugger asked his crew to fix an elbow in some pipe. He did not want the crew to take the elbow apart because too much work had already been invested in it. Complainant testified that the crew took the elbow apart despite Dugger's instructions because it was the only way to properly fix it.

In addition to the pipe elbow incident, complainant was also hurt on the job, injured occurred when Complainant slipped and fell while climbing some scaffolding. It was Complainant's impression that Dugger disliked him because of these two incidents.

Complainant also testified that Dugger was somewhat disorganized. He would often fail to have the proper materials on hand for his workers (T. 58) yet he would become angry when they failed to get their work done. (T. 55).

Ricky Dugger testified that Complainant would often "fool around" too much." (T. 211). He did not stay in his own work area. Dugger wanted Complainant transferred to another crew because he was not completing enough work but General Foreman Bill Deloach had no space for him elsewhere. Eventually Todd Snell replaced Ricky Dugger, becoming Complainant's second foreman.

Complainant testified that Todd Snell was a good foreman and that they had no problem. Complainant did, however, have problem with Bill Deloach and Bart Collins,

the "B" shift superintendent. They attempted to give Complainant a reprimand for being out of his work area but Complainant did not accept the reprimand. Bill Deloach testified that Snell had asked to have Complainant transferred to a different crew because Complainant would not do his work. He talked to the other workmen and slowed them down. (T. 220) Approximately one week after this request Snell approached Deloach and stated that he no longer wished to be foreman. He was replaced by Paul Bradley, Complainant's third foreman.

Complainant testified that he worked for Paul Bradley for approximately six weeks. During this time Complainant filed several quality concerns. Bradley testified that Complainant had a "lackadaisical" attitude, that he did not finish his work, and that he was always ready with an excuse. (T. 232) Bradley noted that Complainant failed to meet at the gang box at the beginning of his shift despite a meeting with the Union Steward to discuss the matter. I note here, for the record, that I did not find Mr. Bradley to be a particularly credible witness, as he seemed overly anxious to impress his company supervisors. While Complainant was under the supervision of Paul Bradley and his fourth foreman, Wayne Sibley, he was partnered with another journeyman insulator named Leonared A. Loftin. Loftin stated that Complainant acted like a spoiled child. He found Complainant to be difficult to work with and asked to be separated from him.

D. *Quality Concerns*

During the time that Complainant was employed by Respondent he filed ten quality concerns. Quality concerns at Plant Vogtle are investigated and reviewed by the manager of the Quality Concern Program, Lee Glenn, and his staff. Mr. Glenn and his staff are employed by Georgia Power Company and have no relationship with Respondent. In cases where the concerns are not submitted anonymously the

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investigation results are reported to the submitter. If the submitter then feels that the concern was not adequately addressed further investigation is carried out. Mr. Glenn testified about the results of the quality concerns filed by Complainant

1. Complainant's first quality concern was filed on April 16, 1986. It dealt with the placement of mud between joints on the pipeline in the turbine buidling. After investigation the concern was unsubstantiated. 2. The second concern was filed on April 17, 1966. This was a two-fold concern. First, it stated that another employee was concerned about being dismissed for having submitted his own concerns. (T. 192) The second part of this concern dealt with support hands being located too close together. These claim were unsubstantiated. (T. 193)

3. The third concern was filed April 24, 1986. Once again, this was a dual concern. It dealt with fiberglass insulation on a particular pipeline and a certain type of tape used in the insulation process not meeting proper standards. The first part of the concern was not

substantiated. The concern regarding the tape was valid and the work was redone. (T. 194)

4. On April 29, 1986 a fourth concern was submitted regarding a question as to whether a particular line had been adequately cleaned prior to the installation of heat tracing. The concern could not be substantiated. (T. 194, 195)

5. The next concern was filed on May 9, 1986. It dealt with possible chlorine contamination of stainless steel pipe caused by a particular tape that was being used by electricians. That concern was still under investigation at the time of hearing, although Mr. Glenn did testify that a problem was found with some of the tape. (T. 195)

6. The sixth concern, filed on May 14, 1986, had to do with a pipeline covering which complainant thought was oxidizing at supervision's instructions. Mr. Glenn could not substantiate the claim. (T. 195, 196)

7. The next concern was filed May 22, 1986. The first issue on this concern was that Complainant's Business Agent had asked him to leave the project, alleging that Complainant was a troublemaker. Mr. Glenn's staff never investigated this part of the concern because Complainant requested that they not pursue the issue. He wanted to follow up on the incident through his union. The second issue alleged that in a certain area Complainant had found oil on the insulation. Although no oil was found, Mr. Glenn testified that the investigation did reveal that quite possibly the insulation had been repaired

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between the time the concern was filed and the date of the investigation. The last issue on this concern dealt with the bands which held the insulation in place. This part of the concern was substantiated. T. 196, 197)

8. The eighth concern was filed on June 13, 1986. Here Complainant alleged that because fiber-glass pads which had been installed were not properly covered they had been damaged. Mr. Glenn's investigation revealed that such pads had, in fact, been damaged due to failure to properly cover them. (T. 197)

9. The ninth concern was filed on June 13, 1986 and alleged that two of Complainant's co-workers had been fired in retaliation for Complainant having filed prior quality concerns. This concern was unsubstantiated.

10. The last quality concern was submitted on June 30, it dealt with Complainant 's transfer to the "B" shift and his being subject to reduction in force. That investigation revealed that Complainant was a legitimate candidate for a lay-off. (T 198).

E. *Denial of Overtime, Transfer to "B" Shift, and Reduction of Force*

The record establishes that Respondent has a "40-hour Rule" under which any employee who fails to work 40 hours of straight time during a week may not work overtime the following weekend. In addition, any employee who arrives late for his shift or who does not work eight hours of straight time on a particular day is not eligible for overtime that same day. Exceptions to the Rule are made for those employees who call in with a justifiable excuse for their lateness. (T. 264) Union job steward, Kurt Drescher, "was catching a lot of heat from other union men about this rule that wasn't being enforced correctly." It was Drescher's responsibility as Union Steward to ensure that the rule was enforced. (T. 268, 264) (Brief of Respondent 8).

The record shows that Complainant was late for work 17 times during his employment with Respondent. On Friday June 20, 1986, Drescher saw Complainant and another worker, A. E. Walling, arrive late to work. Complainant nevertheless proceeded to work overtime that day without any apparent repercussions. The next day, Saturday, Drescher, saw that both Complainant and Walling were at work, doing overtime. (T. 265) Drescher checked with foreman Sibley, who stated that he did not realize that these men had arrived for work late on the preceding day. Upon further investigation Drescher discovered that Walling had a valid excuse for being late while Complainant did not. Drescher sent Complainant home, thereby denying him his weekend overtime. (T. 266).

Complainant testified that other men were also late during that week but were not penalized. He stated that although the "40-Hour Rule" was the official policy, it was not the policy which was practiced on a day-to-day basis.

When Drescher sent Complainant home he also told him to begin reporting for work on the "B" shift as of the following Monday. At this time there was a list of men waiting to be transferred to the "B" shift. Several men were ahead of Complainant. Drescher pushed Complainant to the head of the list because he had received complaints about him. Drescher testified that Complainant was frequently late and that he thought a 5:30 p.m. start time would make it easier for Complainant to be on time for work. (T. 267) Drescher knew that Complainant had requested "B" shift duties. (T. 267)

On June 24, 1986, Petitioner's second day on "B" shift, Bill Lamkin, Mechanical Section Supervisor for Georgia Power on "B" shift, received a complaint that "no one was working" in BMI shaft, which was the area where Dan Emory was assigned. (T. 277) Lamkin confirmed the report and contacted Bart Collins. (T. 277) Collins carried the job steward, general foreman, Tom Spell, and foreman Tom Corley to the room. (T. 289) The steward reported that no one in the room, including Petitioner, was working, but requested that Collins allow him to handle the situation. (T. 289)

The following night, June 25, 1986, the lights went out, so Collins instructed the general foreman to pull the workers out of the building. (T. 291) James Morris told his foreman, Tom Corley, that he was going to wait in a particular storage shed with

Petitioner and another worker. (T. 315) There was only one bucket in the shed to sit on so Complainant lay down. The Vogtle Project has a rule prohibiting employees from lying down on the job. Corley reported to Collins that he had found a man lying down who may have been sleeping. (T. 292, 299) Collins, not knowing the identity of the man, told Corley to fire him if he was lying down. (T. 292) Corley went to the job steward, who suggested that the man lying down be laid off rather than fired.

That night, Complainant was included in a reduction of force directed by Georgia Power Company. Four other men in Complainant's crew were also among those laid off during this reduction of force. General Foreman Spell put together the list of the five men in Complainant's crew who were to be laid off. He approved the inclusion of Complainant on this list. It was his opinion that in the short period of time during which Complainant was on the "B" shift, Complainant had been unproductive. He had observed Complainant wandering out of his work area and staring into space. (T. 308, 311) Bart

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Collins testified that he was not surprised to see Complainant's name on the reduction of force list because he had received several prior complaints about Complainant's work.

The record show that at the time Curt Drescher transferred the Complainant to the "B" shift he did not know about the lay-off. (T. 268) Bart Collins did not find out the reduction in force until the day before it went into effect. (T. 290) Eventually between 80-90 people were included in the reduction of force. (T. 164)

CONCLUSIONS OF LAW

A. *Burdens and Standards of Proof*

The principle to be applied in retaliatory action cases arising under 42 U.S.C. § 5851 and 29 C.F.R. Part 24 have been set forth by the Secretary of Labor in *Dartney v. Zack Company of Chicago*, 82 ERA-2 (April 25, 1983). In that case the Secretary noted that two Supreme cases, taken together, comprise the framework for analyzing evidence and evaluating burdens of production and proof in § 5851 cases. The first case, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), which arose under Title VII of the Civil Rights Act of 1964, established that it is the Plaintiff who must bear the burden of persuasion that intentional discrimination has occurred. The second case, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), was a retaliatory adverse action case which arose under the Constitution. That case, which the Secretary found to be "closely analogous" to cases under 29 C.F.R. Part 29, set forth the standard for the burden of proof which shifts to the defendant once the Plaintiff has carried his burden of persuasion.

> Under *Burdine*, the employee must initially present a prima facie case consisting of a showing that he engaged in protected conduct, that the employer

was aware of that conduct and that the employer took some adverse action against him. In addition, as part of his prima facie case, "the plaintiff must present evidence sufficient to raise the inference that ... protected activity was the likely reason for the adverse action." *Cohen v. Fred Mayer, Inc.*, 686 F. 2d 793 (9th Cir. 1982) (applying Burdine to a retaliatory discharge claim under section 704 (a) of Title VII). If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory

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reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. *Burdine*, supra, 450 U.S. 248, 254-255. If the employer successfully rebuts the employee's prima facie case, the employee still has "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision.... [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id*. at 256 (citation omitted.) The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Conversely, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to established his case by a preponderance of the evidence. *Id*. at 254-265. Finally, the trier of fact may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had dual motive.

Dartney at 7-9.

B. *Protected Activity*

It is well settled that an employee may not seek redress under § 5851 unless he has been discriminated against for engaging in activity which is protected by the Act. In the case at hand, Complainant asserts that the conduct which allegedly caused his denial of overtime and inclusion in the reduction of force was his submission of a series of internal quality concerns. Respondent argues that Complainant is unable to establish his *prima facie* case because internal quality concerns do not constitute protected activity.

Several cases have addressed this issue. In *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984) the Ninth Circuit held that the filing of internal safety and quality control complaints by quality control inspectors is protected by § 5851. In so holding the Court analogized the "Whistleblower" provision of the Energy Reorganization Act to the comparable provision in the Mine Health and Safety Act. The

Court noted that both Acts "share a broad, remedial purpose of protecting workers from retalization based on their concerns for safety and quality." *Mackowiak*, 735

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F.2d at 1163.

Six months later the Fifth Circuit decided the same issue differently creating a conflict among the Circuits. In *Brown & Root, Inc. v. Donovan*, 797 F. 2d 1029 (5th Cir. 1984), the Fifth Circuit held that the filing of intracorporate quality control reports is not protected activity within the meaning of § 5851. This decision was predicated on three considerations. First, the Court found that the language of the provision[2] did not encompass such reports. Second, the Legislative history of the Act did not support an extension of the meaning of § 5851 to include internal reports. Third, the structure of the Act as a whole indicated that § 5851 was designed to protect only those "whistle blowers" who provide information to govermental entities, not to the employer itself.

In December, 1985 the Tenth Circuit, in *Kansas Gas and Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1965) (cert. denied 106 S. Ct 3311 (1986)), "specifically rejected the Fifth Circuit's ruling in *Brown & Root* and instead aligned itself with [the] earlier ruling of the Ninth Circuit that internal complaints are covered [by the Act]." *Kansas Gas and Electric Co. v. Brock*, 106 S.Ct. 3311, 3312 (1986)(White, J. dissenting). The Court found that "although the statutory language does not unambiguously include such cases, the statute's purpose and its Legislative history indicate that its extension to purely internal complaints is appropriate." *Id*.

Although the United States Supreme Court has refused to resolve this conflict in the Circuits, the Secretary has made it clear that the Department Of Labor adopts the finding that reporting safety and quality concerns internally to an employer constitutes protected activity. *Priest v. Baldwin Assocs*. 84-ERA-30 (June 11, 1986). For these reasons I find that Complainant's filing of internal quality concerns does constitute protected activity within the definition of the Act.

C. *Protected Employee*

Respondent also argues, as a preliminary issue, that Complainant is not a protected employee under the Act. In support of this assertion Respondent points to Justice White's dissenting opinion to the Supreme Court denial of certicrari in *Kansas Gas* as "Interpret[ing] the decision below as holding that § 5851 'prohibits an employer from terminating a *quality control inspector* because the *inspector* has filed internal safety complaints.' Emphasis added.]" Brief of Respondent at 17.

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Respondent also argues that the Fifth Circuit in *Brown & Root* pointed out *Mackowiak's* reliance on the status of the complaining employee as a quality control Inspector. *Brown v. Root*, 747 F.2d at 1036. *Brown v. Root* noted that one Mackowiak rationale for extending § 5851 protection to internal filings was the fact that the employee was a quality control inspector. *Id*. The protections of § 5851 were extended to these particular employees because of their duty to enforce NRC regulations. *Mackowiak*, 735 F.2d at 1163.

Respondent asserts that because Complainant was not a quality control inspector there was no connection with the NRC regulations which the Act seeks to uphold. Since it was not Complainant's duty to enforce NRC regulations he is not a protected employee. I disagree with this rational. It is true that Complainant was not a quality control inspector. Where, however, internal complaints relate to the safety of those in and around the nuclear facility involved, they should be protected. Complainant was involved in the insulation of piping within the nuclear plant. Dennis Harris, Respondent's own Project Manager at Plant Vogtle stated that insulation is a safety measure. Although "the lines are not that hot ... they're in areas where it could be dangerous to personnel and we ... insulate for personnel protection." (T. 158) I find, therefore, that in order to further the concerns of the Act, Complainant will be considered a protected employee.

D. *Retaliatory Actions*

It having been established that Complainant is indeed a protected employee who engaged in protected activity, it must be further decided whether Complainant has established the other elements of his *prima facie* case of discrimination. First, the employer must have been aware of the conduct in which Complainant was engaged. There has been no dispute that Respondent was aware of Complainant's quality concerns. Second, the employer must have taken some adverse action against the employee. Again, there has been no dispute that Complainant was denied overtime and was included in a reduction in force. Lastly, Complainant "must present evidence sufficient to raise the inference that ... protected activity was the likely reason for the adverse action." *Cohen v. Fred Mayer, Inc.*, 686 F.2d at 796.

In the instant case Complainant first asserts that he was discriminatorily denied overtime. I find that Complainant was indeed denied overtime. This denial was not, however, discriminatory in nature. Complainant testified that Dick Bland, Bill Deloach, and Randy Taylor were also late at some point during the week in question but that they were not denied overtime. None of these men, however, were members of Complainant's crew. The one worker who was allowed to work overtime after having been late had

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presented a valid excuse to the Respondent. Complainant did not have an excuse, and indeed, had already benefited from overtime that week which he did not deserve.

As to Complainant's inclusion in the reduction of force, I find that no inference that this action by Respondent was caused by Complainant's filing of quality concerns. The record has established that both Respondent and at least one of Complainant's partners found Complainant to be a difficult employee. He was described as "lackadiaisical" and was often found not working. Under such circumstances it is a difficult burden to make a *prima facie* showing that you alone, among 80-90 men who were included in a single reduction of force, were discriminated against. I find that Complainant has not met this burden.

CONCLUSION

For the foregoing reasons, I conclude that the Complainant has failed to make out a *prima facie* case of discrimination under § 5851. It is hereby ORDERED that the complaint be DENIED.

ROBERT J. SHEA
Administrative Law Judge

RJS:ga

[ENDNOTES]

[1] The following abbreviations are used: Co. Ex. - Company Exhibit; T-Transcript; Comp. Ex. - Complainant's Exhibit.

[2] Section 5851(a), provides:

> No employee, including a Commission licensee, an application for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -
> 1. commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> 2. testified or is about to testify in any such proceeding or;
> 3. assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].